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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 356

(16,782.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1898.

No. 230.

ELIZABETH M. HUMPHRIES, BY HER NEXT FRIEND, JOHN W. HUMPHRIES, PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 24, 1899.

1 In the Court of Appeals of the District of Columbia.

THE DISTRICT OF COLUMBIA, Appellant,
vs.
ELIZABETH M. HUMPHRIES, by Her Next Friend. } No. 742.

Supreme Court of the District of Columbia.

ELIZABETH M. HUMPHRIES, an Infant, by John W. Humphries, Her Next Friend,
vs.
THE DISTRICT OF COLUMBIA. } No. 38281. At Law.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Amended Declaration.

Filed May 22, 1896.

In the Supreme Court of the District of Columbia.

ELIZABETH M. HUMPHRIES, an Infant, by John W. Humphries, Her Next Friend, Plaintiff,
vs.
THE DISTRICT OF COLUMBIA, Defendant. } At Law. No. 38281.

Comes now the said plaintiff and, by leave of the court, amends her declaration herein so that the same shall read as follows:

1.

The plaintiff, an infant under the age of twenty-one years, by her next friend, John W. Humphries, sues the defendant, The District of Columbia, a municipal body corporate, for that the defendant was on the 4th day of April, 1895, and for a long time prior thereto charged by law with the care of the public streets, bridges, and highways within the District of Columbia, and it was the duty of the defendant at all times to keep and maintain such bridges and highways in good repair and so that they would be reasonably safe and free from danger to such persons as might from time to time pass and repass over and upon the same.

2 And for that, on the days and times aforesaid, there was and there still is in the said District a certain bridge and public highway built over the Eastern branch of the Potomac river and

extending from the city of Washington to the village of Anacostia, and commonly known and called, to wit, the Navy Yard bridge, over which the public were accustomed daily to pass and repass, and in which said bridge there was and still is a certain draw, which from time to time was lifted by mechanism thereto attached, so as to permit vessels to pass under and through the said bridge, and was thereafter again put in place so as again to permit foot passengers and vehicles to pass over the said bridge and over the said draw, so as aforesaid a part of said bridge, and it was the duty of the defendant to maintain said bridge and the said draw in good repair and in condition safe for persons who might pass and repass over the same; but plaintiff says that, not regarding its said duties in that behalf, the defendant, to wit, on the said 4th day of April, 1895, wrongfully and negligently suffered and permitted the said bridge to be and remain in such bad repair that a part of the floor of the said draw, when the same was lowered so as to form a part of said bridge, did not become flush or level with the floor of the stationary part of said bridge, and it was thereby dangerous to persons not having knowledge of such defective condition to pass upon the said draw; and plaintiff says that on the day and year aforesaid, and while she was lawfully passing along said bridge and from the said stationary part thereof to and upon the said southerly end of the said draw, and without any fault or negligence on her part, and without any knowledge on her part of the said dangerous and defective condition of said bridge as aforesaid, and because only of said dangerous and defective condition, the left foot of her, the said plaintiff, was caught between the said draw and the stationary part of said bridge and greatly cut, bruised and lacerated, and the plaintiff thereby suffered great pain for a long period of time, to wit, from thence hitherto, and plaintiff thereby also suffered a great mental shock, which caused her to be seized by and affected with spasms, epileptic in their nature, and to be thereby permanently injured and affected in her health, to the great damage of the plaintiff, to wit, ten thousand dollars.

2.

The plaintiff sues the defendant for that, at the time and place in the first count set forth, it became and was the duty of the defendant to maintain suitable guards and barriers at the southern end of the draw in the said bridge in said first count described whenever the said draw was not in place in said bridge and highway, so as to warn and prevent persons who might be lawfully upon said bridge from entering at such time upon the said draw, and it was also the duty of the defendant to give notice to persons lawfully upon said bridge and passing over the same when the said draw was not in place and was not safe for such persons to enter upon it, and for that, to wit, on the said 4th day of April, 1895, the plaintiff was lawfully upon said bridge and passing from the southerly end thereof
3 toward the more northern end, and plaintiff says that said draw was not in place and was not safe for her and for other persons to enter upon, all of which was unknown to the plain-

tiff, and the defendant, not regarding its duty in the premises, then and there negligently and carelessly failed to provide or maintain any guards or barriers at or near the said southern end of said draw to warn or prevent persons on said bridge that said draw was not in place and was not safe to persons who might enter thereon, and did not give notice thereof to the plaintiff in any way, but in all its said duties negligently made default, and plaintiff then and there attempted to enter upon said draw to continue upon her attempted passage of said bridge, and thereupon and without any fault or negligence on her part and because only of the unsafe and dangerous condition of said draw, as aforesaid, and because the same was not in place, the left foot of her, the said plaintiff, was caught between the said draw and the stationary part of said bridge and was greatly cut, bruised, and lacerated, and the plaintiff suffered great pain therefrom and was made sick and sore for a great period of time, to wit, for thence hitherto, and also suffered and sustained a great nervous and mental shock, which caused her to be affected with spasms, epileptic in their nature, and to be thereby permanently affected in her health, to the great damage of the plaintiff, to wit, ten thousand dollars.

And the plaintiff claims ten thousand dollars, besides costs.

ARTHUR A. BIRNEY,
LEMUEL FUGITT,
WOODBURY WHEELER,
Attorneys for Plaintiff.

Defendant's Plea.

Filed May 26, 1896.

In the Supreme Court of the District of Columbia.

ELIZABETH M. HUMPHRIES, by Next Friend, etc.,
vs.
THE DISTRICT OF COLUMBIA.
} At Law. No. 38281.

And now comes the defendant, by its attorneys, and for plea to the amended declaration says it is not guilty in manner and form as alleged.

S. T. THOMAS,
A. B. DUVALL,
Attorneys for the Defendant.

4 *Joinder in Issue.*

Filed May 27, 1896.

In the Supreme Court of the District of Columbia, the 26th Day of May, 1896.

HUMPHRIES
vs.
D. C. } At Law. No. 38281.

The plaintiff joins issue with the plea of the defendant.

A. A. BIRNEY,
L. FUGITT,
W. WHEELER,
Attorney- for Pl'ff.

TUESDAY, *December* 1, 1896.

Session resumed pursuant to adjournment, Mr. Justice Bradley presiding.

* * * * * * *

The following case was certified to crim. ct. No. 1, Cole, J.:

ELIZABETH M. HUMPHRIES, by Her Next Friend, John W. Humphries, Plaintiff,
vs.
THE DISTRICT OF COLUMBIA, Defendant. } At Law. No. 38281.

Come here again the parties aforesaid in manner aforesaid, and the same jury return into court, except John T. Wright, who does not appear, and having said sealed verdict in his possession as foreman sends the same to the court by Dr. McWilliams, who delivers the same to the court with the statement that the said John T. Wright is ill and confined to his bed and physically unable to appear in court; that he, said McWilliams, is his attending physician, and as such received from said Wright said sealed verdict with direction to deliver it to the court; whereupon the defendant, by its counsel, objected to the reception, opening, and reading of said sealed verdict; whereupon, in answer to the questions of the court, the remaining jurors severally on their oath say that they severally signed said verdict, and that they saw said John T. Wright sign the same, and that the name "John T. Wright," signed thereto, is in his handwriting; "thereupon the remaining jurors on their oath say they find said issue in favor of the plaintiff and assess her damages by reason of the premises at seven thousand dollars ($7,000)."

The counsel for the defendant ask that the jury be polled, which is done, and each of said remaining jurors on his oath says that he finds said issue in favor of the plaintiff and assess- her damages by reason of the premises at $7,000.00.

5 Supreme Court of the District of Columbia.

Filed in open court Dec. 1, 1896. J. R. Young, clerk.

Instructions to Jury.

When the jury agree upon a verdict, write it out, all of the jurors sign it, date it, seal it up, and deliver to the foreman, to be delivered in open court on the 1st day of Dec'r, 1896, and in the presence of all who sign it.

ELIZABETH M. HUMPHRIES
vs.
THE DIST. OF COL. } No. 38281. At Law.

DATED Nov. 30, 1896.

We, the jurors sworn to try the issue joined in the above-entitled cause, find said issue in favor of the plaintiff, and that the money payable to him by the defendant is the sum of seven thousand dollars and — cents ($7,000.00).

All sign:

MICHAEL KEEGAN.	LESTER G. THOMPSON.
W. H. ST. JOHN.	WM. J. TUBMAN.
GEO. W. REARDEN.	JOHN T. WRIGHT.
JAMES D. AVERY.	JOS. I. FARRELL.
BERNARD F. LOCRAFT.	ISAAC N. ROLLINS.
GEO. W. AMISS.	THOS. J. GILES.

When in favor of the defendant, as follows:

ELIZABETH M. HUMPHRIES
vs.
THE DIST. OF COL. } No. 38281. At Law.

DATED Nov. 30, 1896.

We, the jurors sworn to try the issue joined in the above-entitled cause, find said issue in favor of the defendant.

All sign:

.....	.....
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... .	....
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Please observe these directions carefully.

C. C. COLE, *Justice.*
F. W. S.

6 *Motion in Arrest of Judgment.*

Filed December 4, 1896.

In the Supreme Court of the District of Columbia.

ELIZABETH M. HUMPHRIES
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 38281.

And now comes the defendant and moves the court to arrest the judgment in the above-entitled case:

1. Because the court having instructed the jury that there could be no recovery under the first count of the declaration in said cause, there only remained of the said declaration the second count thereof, and the defendant says that no cause of action against it is set out or stated in the said second count of the said declaration.

2. Because there was no verdict rendered by the jury in the said cause upon which judgment may be rendered.

3. And for other reasons upon the record.

S. T. THOMAS,
A. B. DUVALL,
Attorneys for the Defendant.

MONDAY, *January* 4, 1897.

Session resumed pursuant to adjournment, Mr. Justice Bradley presiding.

* * * * * * *

ELIZABETH N. HUMPHRIES, by Her Next Friend, John W. Humphries, Plaintiff,
v.
THE DISTRICT OF COLUMBIA, Defendant. } At Law. No. 38281.

This case coming on to be heard upon the defendant's motions for a new trial and in arrest, and the same having been heard, it is considered that said motions be, and the same are hereby, overruled and judgment on verdict ordered. Therefore it is considered that the plaintiff recover against the defendant seven thousand dollars ($7,000) damages, in manner and form aforesaid assessed, together with her costs of suit, to be taxed by the clerk, and have execution thereof.

Appeal noted to the Court of Appeals by defendant.

Memorandum.

Jan'y 4, '97.—The Oct. term of the court prolonged 30 days to settle bill of exceptions.

7 *Motion to Correct Entry on Record.*

Filed January 23, 1897.

In the Supreme Court of the District of Columbia.

JOHN W. HUMPHRIES, ETC., *vs.* THE DISTRICT OF COLUMBIA. } At Law. No. 38281.

Now comes the plaintiff, by her attorneys, and moves the court to correct the entry upon its records of the verdict rendered in this cause as found on page 67 of minutes 35, by setting out therein at length the written verdict so returned under seal, because she says that said verdict or any recital of its contents do not now appear in said entry or any other entry.

A. A. BIRNEY,
W. WHEELER,
Attorneys for Plaintiff.

Mr. S. T. Thomas, attorney for District of Columbia:

Take notice that on Friday next, January 22, at the sitting of the court, the foregoing motion will be called up for hearing before Mr. Justice Cole.

A. A. BIRNEY,
Of Plaintiff's Counsel.

FRIDAY, *January* 22, 1897.

Session resumed pursuant to adjournment, Mr. Justice Cole presiding.

* * * * * * *

ELIZABETH M. HUMPHRIES, by Her Next Friend, John W. Humphries, Plaintiff, *v.* THE DISTRICT OF COLUMBIA, Defendant. } At Law. No. 38281.

Upon hearing the plaintiff's motion to correct the entry of the verdict in this case, it is considered that said entry be corrected now for then, by striking therefrom the following, which was inadvertently entered, to wit: "Thereupon the remaining jurors on their oath say they find said issue in favor of the plaintiff and assess her damages by reason of the premises at seven thousand dollars ($7,000)," and insert in lieu thereof the following, as ordered recorded by the court at the time said verdict was rendered, to wit: And thereupon the court receives said sealed verdict as the verdict of the jury and orders the same spread upon the minutes, and the same is in the following words:

We, the jurors sworn to try the issue joined in the above-

8 entitled cause, find said issue in favor of the plaintiff, and that the money payable to her by the defendant is the sum of seven thousand dollars ($7,000).

MICHAEL KEEGAN.	LESTER G. THOMPSON.
W. H. ST. JOHN.	WILLIAM J. TUBMAN.
GEO. W. REARDON.	JOHN T. WRIGHT.
JAMES D. AVERY.	JOS. J. FARRELL.
BERNARD F. LOCRAFT.	ISAAC N. ROLLINS.
GEO. W. AMISS.	THOS. J. GI-ES.

To which order the defendant's attorney objects and notes an exception.

Motion to Dismiss Appeal.

Filed February 23, 1897.

In the Supreme Court of the District of Columbia, Holding a Circuit Court.

ELIZABETH HUMPHRIES } vs. DISTRICT OF COLUMBIA. } No. 38281. Law.

Now comes the plaintiff and moves the court to dismiss the appeal entered herein, because she says that no bond or deposit of money for securing of costs in the Court of Appeals has been given or made and no transcript of record has been transmitted to said Court of Appeals, as required by the rules of said court.

A. A. BIRNEY,
Of Plaintiff's Attorney.

Memorandum.

M'ch 8, '97.—Motion to dismiss appeal overruled.

Mandate.

Filed June 24, 1897.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the justices of the supreme court of the District of Columbia, Greeting:

Whereas lately, in the supreme court of the District of Columbia, before you or some of you, in a cause between Elizabeth M. Humphries, by her next friend, John W. Humphries, plaintiff, and The District of Columbia, defendant—law, No. 38281—wherein the judgment of the said supreme court, entered in said cause on the 4th day of January, A. D. 1897, is in the following words, viz:

"This case coming on to be heard upon the defendant's motions for a new trial and in arrest, and the same having been heard, it is considered that said motions be, and the same are hereby, overruled

and judgment on verdict ordered. Therefore it is considered
9 that the plaintiff recover against the defendant seven thousand dollars ($7,000) damages, in manner and form aforesaid assessed, together with her costs of suit, to be taxed by the clerk, and have execution thereof.

Appeal noted to the Court of Appeals by defendant."

As by the inspection of the transcript of the record of the said supreme court, which was brought into the Court of Appeals of the District of Columbia by virtue of an appeal, agreeably to the act of Congress in such case made and provided, fully and at large appears;

And whereas in the present term of April, in the year of our Lord one thousand eight hundred and ninety-seven, the said cause came on to be heard before the said Court of Appeals on the said transcript of record and on a motion to dismiss, which was argued by counsel:

On consideration whereof it is now here ordered and adjudged by this court that this appeal be, and the same is hereby dismissed with costs, and that the said plaintiff recover against the said defendant, The District of Columbia, — for her costs herein expended and have execution therefor.

MAY 10, 1897.

You, therefore, are hereby commanded that such execution and proceedings be had in said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Richard H. Alvey, Chief Justice of said Court of Appeals, the 24th day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

ROBERT WILLETT, [SEAL.]
Clerk of the Court of Appeals of the District of Columbia.

Costs of Plaintiff.

Clerk..... $—, paid.
Printing record..... $—

Motion to Vacate Judgment.

Filed June 30, 1897.

In the Supreme Court of the District of Columbia.

ELIZABETH HUMPHRIES, by Her Next Friend,
vs.
THE DISTRICT OF COLUMBIA. } Law. No. 38281.

And now comes the defendant, by its attorneys, and moves the court to vacate and set aside the judgment entered in the above-entitled cause on the 4th day of January, 1897, and assigns as reasons therefor the following:

1. That there was no verdict rendered in said cause.

10 2. That the judgment entered therein was not in accordance with the practice of said court.

3. And for other reasons appearing on the face of the record.

S. T. THOMAS,
A. B. DUVALL,
Attorneys for the District of Columbia.

Supreme Court of the District of Columbia.

FRIDAY, *October* 15, 1897.

Session resumed pursuant to adjournment, Justice Cole presiding.

* * * * * * *

ELIZABETH HUMPHRIES, by Her Next Friend, Pl't'ff,
vs.
THE DISTRICT OF COLUMBIA, Def't. } At Law. No. 38281.

Upon hearing the defendant's motion to vacate the judgment rendered herein, it is considered that said motion be, and the same is hereby, overruled.

Order for Appeal.

Filed October 19, 1897.

In the Supreme Court of the District of Columbia, the 19 Day of October, 1897.

ELIZABETH M. HUMPHRIES, ETC.,
vs.
THE DISTRICT OF COLUMBIA. } At Law. No. 38281.

The clerk of said court will please enter an appeal to the Court of Appeals from the order overruling the motion to vacate judgment entered in above cause, said order hereby appealed from having been entered October 15th, 1897, and issue writ of citation to appellee.

S. T. THOMAS, *Att'y D. C.*

In the Supreme Court of the District of Columbia.

ELIZABETH M. HUMPHRIES, by Her Next Friend, John W. Humphries,
vs.
DISTRICT OF COLUMBIA. } At Law. No. 38281.

The President of the United States to Elizabeth M. Humphries, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein under and as directed by the rules of said court, pursuant to an appeal filed in the clerk's office, supreme court of

the District of Columbia, on the 19th day of October, 1897,
11 wherein The District of Columbia is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant on the 15th day of October, 1897, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 19th day of October, in the year of our Lord one thousand eight hundred and ninety-seven.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 21 day of October, 1897.

A. A. BIRNEY,
Attorney for Appellee.

Opinion of Justice Cole.

Filed October 19, 1897.

ELIZABETH HUMPHRIES, by Her Next Friend,
v.
THE DISTRICT OF COLUMBIA. } At Law. No. 38281.

Motion to vacate a judgment.

The judgment of this court mentioned in the motion was entered in this cause against the defendant at the October term thereof, 1896, to wit, on the 4th day of January, 1897, the last day of the said October term. The January term, 1897, of the court commenced on the 5th day of January, 1897, and expired by limitation on the 5th day of April, 1897, and the April term commenced on the 6th day of April, 1897, and expired on the 4th day of October, 1897. The present motion was filed on the 30th day of June, 1897, after the expiration of the term in which the judgment was rendered. The defendant appealed from the said judgment against it to the Court of Appeals, which, upon a motion by the plaintiff—appellee in that court—to dismiss the appeal, held that the verdict upon which the said judgment was entered was void; but, because of some irregularity in the appeal, held that it had no jurisdiction thereof and dismissed the appeal, leaving the judgment in full force if it be valid. This motion is based upon the theory that, as the verdict was void, the judgment entered thereon is also void, and that therefore this court has now the power to vacate it. If the premises are correct, the conclusion undoubtedly is. The court not only has the power, but it is its duty, to strike from its records an entry purporting to be a judgment which is in fact a mere nullity, and its power and duty in this regard is not confined to the term in which the judgment was entered, but exists without limitation in point of time. But if the judgment be valid, however erroneous it

may be, in fact or in law, the power of this court to vacate it expired with the term at which it was entered.

Phillips *v.* Negley, 117 U. S.

12 It was suggested at the argument that this case falls within the exceptions to the rule recognized in the case just cited, to wit, the correction of clerical mistakes and writs of error *coram vobis;* but it is clear that the error in the record of this judgment does not come un-er either of the exceptions mentioned. The first relates to the inadvertance of the clerk in making entries variant from what the court directs, and the second relates to mistakes of fact, such as the death of one of the parties prior to judgment. The error in this case was not an inadvertance of the clerk nor an error in relation to any fact, but an error of law committed by the court in holding that a sealed verdict might be received in the absence of one of the jurors who had signed it. It follows that if that error renders the judgment void this motion should prevail; otherwise that it should be denied.

The argument in support of the motion is that, as the verdict was void, the defendant was denied the constitutional right of trial by jury, and that denial of such constitutional right to the defendant in the course of the trial renders the judgment void.

In *Ex parte* Bigelow, 113 U. S., 328, the case was this: Several indictments for embezzlement were pending in this court against Bigelow, which were, by order of the court, consolidated for trial. After the jury was sworn to try the issues in the consolidated cases and the trial had progressed for a brief time the court, upon its own motion and against the protest of the defendant, directed the jury to be discharged and the order of consolidation of the causes for trial to be set aside, and the Government then proposed to try the defendant upon one of the indictments; whereupon he interposed a plea of former jeopardy, claiming that the swearing of the jury in the consolidated cases constituted such jeopardy. The court overruled the plea, and there was a trial upon the plea of not guilty and a conviction, which was affirmed by the court in general term. Bigelow thereupon applied to the Supreme Court for a writ of *habeas corpus* on the ground that the judgment against him was void because of the violation at the trial of the constitutional provision that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." The Supreme Court in denying the petition for the writ said: "We are of opinion that what was done by that court was within its jurisdiction; that the question thus raised by the prisoner was one which it was competent to decide, which it was bound to decide, and that its decision was the exercise of jurisdiction. * * * Without giving any opinion as to whether that decision was sound or not, we cannot grant the writ now asked for."

The case of *In re* Schneider, 148 U. S., 162, was also an application to the Supreme Court for a writ of *habeas corpus* to discharge the petitioner from imprisonment under a verdict and judgment of conviction in this court on the ground that the verdict and judgment

were void because at the trial he was not accorded by the court an impartial jury, as guaranteed him by the Constitution. The counsel for the petitioner in their brief in that case stated their claim to the writ in the following language: "The claim in this case is that the petitioner, under the circumstances shown in the
13 record, did not have an impartial jury, such as he was entitled to under the Constitution of the United States, and that for that reason the court below was without jurisdiction and power to proceed further with the trial and to enter judgment and sentence upon the verdict." The Supreme Court declined to decide the constitutional question presented by the petition, holding that the question was one which this court had the jurisdiction to decide, and although it might have erred in its judgment, the error was not jurisdictional, and that the judgment was therefore valid.

In the case of *In re* Belt, 159 U. S., 95, Belt was convicted in this court of a second offence of petit larceny and sentenced to the penitentiary. The indictment charged that he was convicted of the first offence in the police court of this District, and when the record of that court was offered in evidence in support of the indictment it appeared that the petitioner had waived a jury trial in that court, in pursuance of an act of Congress authorizing it, and had been tried and convicted by the court without a jury, and this record was objected to by Belt's counsel on the ground that the act of Congress authorizing the waiver of a jury trial was in violation of the constitutional provision securing to persons charged with crime a trial by jury, and that the record of the trial and judgment by the police court was void; but this court admitted the record in evidence, and there was a conviction. After affirmance of the judgment by the Court of Appeals, Belt applied to the Supreme Court for the writ of *habeas corpus* on the ground that he had been convicted in violation of the Constitution, and that the judgment against him was void; but the Supreme Court declined to decide the constitutional question raised, holding that this court had jurisdiction to decide that question, and even if it erred in its decision that did not render the judgment void. And at the last term of the Supreme Court it had before it an application for a writ of *habeas corpus* by a person in custody under the judgment of a State court of Wisconsin based on the claim that the judgment was void because the verdict was so irregular and variant from statutory requirements as to render it void. In that case the court said: "It was within the jurisdiction of the trial judge to pass upon the sufficiency of the verdict and to construe its legal meaning. If on doing so he erred * * * it was an error committed in the exercise of jurisdiction;" and again points out with great clearness the distinction between a void judgment and one simply erroneous and liable to be reversed on error, and cites, amongst others, the above-named cases, and reaffirms the doctrine therein stated.

In re Eckart, 166 U. S., 481.

The case of *In re* Nielson, 131 U. S., 176, is especially relied upon in support of the contention that the denial of a constitutional right

renders a judgment void, and there are some expressions in the opinion, if considered by themselves and apart from the facts of the case, which might be so construed; but that proposition was not held in that case, nor did the facts present it. The record of the
14 judgment in question in that case showed that the petitioner had been convicted and sentenced the second time for the same offence, and the court held the judgment void on the ground that, as the Constitution prohibits a second penalty for the same offence, the court had no jurisdiction to pronounce the second judgment of condemnation. The ground of the decision was stated by the court in the following terse language: "In the present case the sentence given was beyond the jurisdiction of the court, because it was against an express provision of the Constitution which bounds and limits all jurisdiction." That the Supreme Court considers this case in harmony with the other cases herein referred to is manifest from the fact that it is cited in support of the opinion in the Schneider case.

Undoubtedly the rule as stated by the Supreme Court is that in order to render a judgment valid the court rendering it should not only have jurisdiction of the subject-matter and the parties, but also should have jurisdiction to render the judgment, and that if it has not jurisdiction to render the judgment it will be void, although it may have had jurisdiction of the subject-matter and the parties. But there can be no question that this court had jurisdiction to render the judgment mentioned in the motion. The fact that the court erroneously held in the course of the trial that a verdict returned into court was valid when it was void could not affect its jurisdiction to render judgment. The court not only had jurisdiction to decide whether the verdict was valid or void, but, as was said by the Supreme Court in the Belt case, it was its duty to do so, and its error in that regard can no more affect its jurisdiction to proceed with the case than the commission of an error which did not deny a constitutional right would have done. In other words, the court has the same jurisdiction to decide constitutional as it has other questions, when they arise in the course of a trial. It is only when the final judgment is beyond the jurisdiction of the court, as limited by the Constitution or other law, that the judgment is void, if there be jurisdiction of the subject-matter and the parties.

As the error in the record of the judgment mentioned in the motion is mine, I would have preferred to find that this court has the power to vacate the judgment, and thus afford the defendant an opportunity of another trial; but I feel constrained, by the cases referred to, to deny the motion. If this disposition of the motion shall be held by the appellate courts to be correct, and the defendant shall be thereby compelled to pay a judgment in the record of which there is an error, it does not follow that any injustice will be done. I think there can be no doubt but that the case is one for the decision of a jury, and on a new trial, upon evidence substantially like that now in the record, another verdict would be quite as likely to be in excess of as less than the judgment mentioned in the motion.

CHAS. C. COLE.

15 *Direction to Clerk for Preparation of Record on Appeal.*

Filed October 20, 1897.

OCT. 20TH, 1897.

Clerk will please make record for appeal from order overruling motion to vacate judgment in case of Humphries *vs.* The District, at law, No. 38281, said record to consist of the same pleadings, orders, etc., as will be found in first record on appeal in this cause, omitting, however, the bill of exception, and commencing again with the mandate of the Court of Appeals to and including the opinion of the court and judgment thereon overruling motion to vacate judgment.

S. T. THOMAS,
A. B. DUVALL,
Att'ys D. C.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing pages, numbered from 1 to 20, inclusive, are true copies of originals in cause No. 38281, at law, wherein Elizabeth M. Humphries, by her next friend, John W. Humphries, is plaintiff and The District of Columbia is defendant, as the same remains upon the files and records of said office.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 23d day of October, A. D. 1897.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 742. The District of Columbia, appellant, *vs.* Elizabeth M. Humphries, by her next friend. Court of Appeals, District of Columbia. Filed Oct. 29, 1897. Robert Willett, clerk.

16 FRIDAY, *December 10th, A. D.* 1897.

THE DISTRICT OF COLUMBIA, Appellant,
vs.
ELIZABETH M. HUMPHRIES, by Her Next Friend, JOHN W. Humphries. } No. 742.

The argument in the above-entitled cause was commenced by Mr. S. T. Thomas, attorney for the appellant, and was continued by Mr. A. A. Birney, attorney for the appellee, and was concluded by Mr. A. B. Duvall, attorney for the appellant.

17 THE DISTRICT OF COLUMBIA, Appellant,
vs.
ELIZABETH M. HUMPHRIES, by Her Next Friend, John W. Humphries. } No. 742.

Opinion.

Mr. Justice MORRIS delivered the opinion of the court:

This is the second appeal in this case. Most of the facts, out of which arises the question now presented for our determination, are stated in the opinion of this court rendered upon the former appeal (25 Wash. Law Rep., 398), and need not here be restated.

The suit is one to recover against the District of Columbia for personal injuries alleged to have been sustained in consequence of the neglect of the officers and agents of the District. There was an issue of fact joined, and a jury was summoned to try that issue. A sealed verdict was authorized. Under the circumstances stated in our former opinion, the jury was polled at the time of the rendition of the verdict, and only eleven jurors answered. Yet the court, over the objection of the defendant, received the verdict, which was in favor of the plaintiff for $7,000, and caused it to be recorded as the verdict of the eleven jurors, the eleven, however, all stating, in answer to questions by the court, that the twelfth juror, who was detained away by illness, had also signed the sealed verdict. A motion in arrest of judgment was interposed by the defendant, upon the one ground, among others, that there was no verdict upon which judgment could be entered. The motion was overruled, and judgment was entered against the defendant for the sum of $7,000.

Subsequently, and at a subsequent term of the court, the plaintiff moved for a correction of the record, so as that the record should show the rendition of a sealed verdict, and the entry of the sealed verdict as the verdict of the jury, without any reference to the fact that it had been delivered only by eleven jurors, or rather that only eleven jurors were present at the time of its delivery by the physician of the absent juror. This motion, also over the objection of the defendant, the court allowed, and ordered the record to stand corrected, as requested in the motion; but no new judgment was then or afterwards rendered upon this corrected verdict, or corrected record of the verdict.

In this condition of things, an appeal, which had been taken to this court immediately upon the rendition of the judgment, but which was not perfected until after the lapse of the time within which it was required to be perfected, came to us; and we were compelled, by reason of that failure, to dismiss it at the hearing. The case, however, having been argued before us on the merits, we deemed it proper in our opinion in the case to discuss the question of the validity of the verdict; and we were compelled to regard that verdict as an utter nullity.

A few days after the dismissal of the appeal, the defendant moved in the court below for a rescission of the judgment that had been rendered by that court, on the ground that there was no verdict to

support it, and that it had been irregularly entered. The term of the court at which it had been rendered had then passed; and even the next term thereafter had come to an end. It was claimed that it was beyond the power of the court at that time to vacate the judgment or to disturb it in any manner. The argument was that the judgment was not void, but at the most voidable or irregular; and that therefore it could not be attacked in any collateral proceeding, which the present motion was regarded as being. To this view the court below acceded, overruled the motion, and refused to vacate the judgment. From this decision the present appeal is prosecuted by the defendant.

We may state, as a preliminary matter, that no reliance seems to be placed by any one upon the curative or corrective action taken by the court below after the rendition of the judgment for the spreading of the sealed verdict upon the record. This was powerless to affect the verdict or judgment already rendered; and it was not followed by any new judgment. It has not entered into the consideration of the question by either side.

In our former opinion in this case, we pronounced the verdict
18 that was rendered an absolute nullity. The broad question now presented is, therefore, whether a valid judgment can be based upon a void verdict. And to the question so stated it is not possible that there can be more than one answer. No superstructure can stand when the foundation has been torn away. There can be no valid judgment when an essential prerequisite to the rendition of judgment is wanting. Under our system of jurisprudence, a contested issue of fact at common law, in the absence of statutory provision authorizing or allowing a different mode and the consent of the parties to have recourse thereto, can only be determined by a trial before a jury of twelve men, and the unanimous verdict of those twelve men upon the issue. Such trial and verdict are essential prerequisites to the rendition of any judgment upon such issue of fact. They are the due process of law necessary to justify the existence of any such judgment, and without which the court is without jurisdiction to pronounce judgment.

Due process of law, said Mr. Justice Field, speaking for the Supreme Court of the United States, in the noted case of Pennoyer *v.* Neff, 95 U. S., 733, means "a course of legal proceedings, according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights." And among those rules and principles there is none more distinctly fixed than the constitutional right of the trial of issues of fact at common law by a jury. That due process of law was not observed in this case, for, while there was a trial before a jury, that jury rendered no verdict, and the trial was abortive. Apart, therefore, from any technical considerations, it is very plain that the judgment entered in this case, being based merely upon a void verdict, must necessarily fall with that verdict. And the premises being granted, this necessarily must have been the result, if the defendant had directly and in due time appealed from the judgment.

But the argument of the appellee now is, that the judgment is

only voidable, and not void; and that its validity cannot be assailed in a collateral proceeding, which the present is claimed to be. And this view prevailed in the court below. We find ourselves unable to accede to it.

It might well be assumed that, whether voidable or void, this judgment might be reached under the act of Maryland of 1787, ch. 9, continued in force with other existing laws of Maryland by the act of Congress of February 27, 1801 (2 Stat., 103). The provision of this statute is as follows:

"In any case where a judgment shall be set aside for fraud, deceit, surprise, or irregularity in obtaining the same, the said courts respectively may direct the continuances to be entered from the court (term) when such judgment was obtained until the court (term) such judgment shall be set aside, and may also continue such cause for so long a time as they shall judge necessary for the trial of the merits between the parties after such cause has been reinstated unless, &c."

As will be noticed, this statute rather recognizes the already existing power of the courts than confers power upon them to set aside judgments after the lapse of the term at which such judgments were rendered for any of the causes specified; and accordingly, as pointed out in the case of Phillips *v.* Negley, 117 U. S., 665, the courts of Maryland, whenever they have had occasion to vacate judgments after the lapse of the term, have based their authority so to do, not so much upon the statute, as upon the inherent power of the courts in the interests of justice. The power to vacate judgments for fraud, deceit, surprise, or irregularity, was regarded by them as a species of equitable power, which the courts of common law might well exercise to prevent the necessity of recourse to a court of equity, when the common law tribunals might equally well afford the desired relief. But in the case above cited of Phillips *v.* Negley, the Supreme Court of the United States, after much consideration, denied the existence of any such power in the courts of the District of Columbia, and held in substance, that after the lapse of the term the courts of this District had no authority to set aside judgments, such as was claimed and exercised by the courts of the State of Maryland.

But both in the case of Phillips *v.* Negley and in that of Bronson *v.* Schulten, 104 U. S., 410, upon which the decision in the case of Phillips *v.* Negley was based, the Supreme Court distinctly recognized an exception to the general rule laid down by it in those cases; and that is, that errors of fact in the rendition of a judgment might be reviewed after the lapse of the term, and the judgment set aside therefor, by the same court which rendered the judgment, through the process of the writ of error *coram nobis*, or its more frequently used modern substitute, a summary motion. And this exception is of universal application for the correction of errors of fact not apparent on the record, and for the vacation of judgments affected by such errors of fact. In the case of Bronson *v.* Schulten some of the errors of fact are specified for which judgments may be vacated under the writ of error *coram nobis*. Among them are such as that one of the parties to the judgment had died before it was rendered, or was an infant and no guardian had appeared or been appointed,

or was a *feme covert*, or the like, or error in the process through the default of the clerk. But it is not claimed that this is an exhaustive enumeration, and the text-books and the authorities indicate that any fact which has not been litigated in the cause and which affects the validity of the judgment may be inquired into under the writ of error *coram nobis*.

Now, it seems to us that that there can be no more serious error of fact impugning the validity of a judgment than to assume that there has been a verdict of a jury when there has been no such verdict. If it were conceded in this case that no jury had been summoned at all, but that upon the issue of fact joined between the parties the court had arbitrarily and of its own motion assumed to render judgment upon the issue, we presume it would not be contended that a constitutional right had not been violated, and that a judgment falsely reciting that it was based upon the verdict of a jury would not be vacated upon writ of error *coram nobis* for this error of fact. It is true that in the present case there was a
19 jury summoned, and the form of a trial had, and that there is something which bears the semblance of a verdict, and which the court below mistook for a verdict, but which we have held to be an absolute nullity, and therefore no verdict. And it is also true that the circumstances surrounding this alleged verdict were all brought to the attention of the court below before the judgment was rendered, and were matters of controversy before the court, and were made by the court itself the subject of great and earnest consideration. But the fact that there was error of law in regarding that as a verdict which was no verdict, does not make it less an error of fact; and when the judgment now before us purports to be based upon the verdict of a jury, when there was in fact no verdict of a jury, it is not apparent to us why this should not be regarded as a most important error of fact, to be inquired into and corrected upon writ of error *coram nobis*, with the right of appeal thereon from the determination of the court.

The theory that the judgment is only voidable, and not void, and that the present is in the nature of a collateral proceeding, can only be supported upon the assumption that the verdict is no part of the record, and that the court below upon this motion, and this court upon appeal can only examine the judgment and declaration to determine whether the judgment can be supported by the declaration. If this be so, then undoubtedly the motion, regarded as the substitute of a writ of error *coram nobis*, is a proper proceeding wherein to raise the question of fact whether there was or was not a verdict of a jury on which to base the judgment.

But, however this be, we are of opinion that this judgment is not merely voidable, but absolutely void, and that it may be so declared in any proceeding to impeach it, direct or collateral. The so-called verdict of the jury is spread upon the record, and made part of the record, and the judgment purports to be based on the verdict as rendered. The judgment, therefore, must be regarded as bearing the evidence of its infirmity upon its face. It is a judgment which the court did not have jurisdiction to pronounce, because the judg-

ment-roll itself shows that the contingency had not arisen under which it was competent for the court to render judgment. It is very clear that jurisdiction of the subject-matter and jurisdiction of the person are not always sufficient to give validity to a judgment. The due process of law, guaranteed by the Constitution and derived to us from Magna Charta, requires even then that the judgment shall not be in excess of the jurisdiction. Windsor *v.* McVeigh, 93 U. S., 283; Pennoyer *v.* Neff, 95 U. S., 733; United States *v.* Walker, 109 U. S., 258; Tenney *v.* Taylor, 1 App. D. C., 223, 227.

In the case last cited of Tenney *v.* Taylor, we said, and we are disposed to reiterate the statement here, that "even where there is jurisdiction of the person and of the subject-matter, if the court does not proceed according to established modes, or transcends the power granted to it by law, that fact may be shown in a collateral proceeding, and, if shown, the judgment will be regarded as void."

Apparently to the contrary effect is the case of Maxwell *v.* Stewart, 21 Wall., 71, and the same case on second appeal in 22 Wall., 77, in which it was held that where the record showed that a cause had been tried by the court without a jury, it not appearing affirmatively that a jury had been waived, this at most was only error to be corrected on direct appeal, and did not invalidate the judgment on collateral proceedings. But that case appears to us to be very different from the present. The statute authorized, as it yet authorizes, the trial of issues of fact by a court upon waiver of trial by jury; and it was no more than a fair inference in support of the judgment that a trial by jury had in fact been waived. We presume the decision would have been very different if the record had shown affirmatively that trial by jury had not been waived, that one of the parties insisted on his right to such trial, and yet that the court had itself undertaken the trial without a jury. In the present case it does appear affirmatively on the record that there was no trial by jury in the constitutional sense, because the jury rendered no verdict, inasmuch as that which eleven of them rendered was an absolute nullity.

The present case, therefore, is one in which the court assumes to render judgment upon an issue of fact, when its own record, incorporated into the judgment, shows in the most positive manner that there was no verdict, and therefore no trial by jury, to which the parties were entitled under the Constitution. This appears to us to be in excess of the jurisdiction of the court.

Certain cases have been pressed upon our attention to show that, when a question claimed to be jurisdictional has been presented to a trial court and determined by it, such trial court is then acting within its jurisdiction, and its error, if error there be, can only be inquired into on appeal. The principal of these cases are those of Eckart (166 U. S., 481), Belt (159 U. S., 95), Coy (127 U. S., 731), and Bigelow (113 U. S., 328). But we do not think that these cases announce any such doctrine as is here contended for by the appellee. In the case of Eckart, for example, upon which most reliance is placed, it was said:

"It was within the jurisdiction of the trial judge to pass upon the

sufficiency of the verdict and to construe its legal meaning; and if in so doing he erred and held the verdict to be sufficiently certain to authorize the imposition of punishment for the highest grade of the offense charged, it was an error committed in the exercise of jurisdiction, and one which does not present a jurisdictional defect, remediable by the writ of *habeas corpus*."

Mr. Justice White, speaking for the Supreme Court of the United States in that case, went into an examination of the previous cases, the same that are now also cited to us; and he finds the same principle governing all of them. An examination of this last, therefore, in reference to the case now before us, may serve for all of them.

The petitioner Eckart was indicted in one of the State courts of the State of Wisconsin for the crime of murder, of which the laws of the State make three degrees; and these laws also make it the province of the jury to determine under which degree the case falls.

By the jury Eckart was found guilty generally, without
20 specification of the degree; and the trial court, holding that the indictment and verdict were sufficient to authorize a conviction for murder in the first degree, assumed to impose sentence as for that degree. Application for a writ of *habeas corpus* was made to the supreme court of Wisconsin, which thereupon held that, although the sentence was erroneous, the error in passing it was not jurisdictional, and the judgment therefore was not void. Upon a similar application to the Supreme Court of the United States based upon the ground that the petitioner was deprived of liberty by the State without due process of law, that tribunal concurred in the doctrine announced by the supreme court of Wisconsin. What it said was this:

"The court had jurisdiction of the offense charged and of the person of the accused. The verdict clearly did not acquit him of the crime with which he was charged, but found that he had committed an offense embraced within the accusation upon which he was tried. It was within the jurisdiction of the trial judge to pass upon the sufficiency of the verdict and to construe its legal meaning; and if in so doing, he erred, and held the verdict to be sufficiently certain to authorize the imposition of punishment for the highest grade of the offense charged, it was an error committed in the exercise of jurisdiction, and one which does not present a jurisdictional defect, remediable by the writ of *habeas corpus*. The case is analogous in principle to that of trial and conviction upon an indictment, the facts averred in which are asserted to be insufficient to constitute an offense against the statute claimed to have been violated. In this class of cases it has been held that a trial court possessing general jurisdiction of the class of offenses within which is embraced the crime sought to be set forth in the indictment is possessed of authority to determine the sufficiency of an indictment, and that in adjudging it to be valid and sufficient acts within its jurisdiction, and a conviction and judgment thereunder cannot be questioned on *habeas corpus*, because of a lack of certainty or other defect in the statement in the indictment of the facts averred to

constitute a crime. *In re* Otey, 127 U. S., 731, 756, 758, and cases there cited."

Now, neither this case nor any other of the cases cited in connection with it, seems to us to be an authority for the position taken by the appellee in the case now before us. There was in the Eckart case an indictment, upon that indictment a trial by jury, and as the result of that trial by jury a verdict, which it may be remarked was perfectly good and sufficient at common law, but which, in view of the requirements of the statute, was imperfect or of doubtful import. It required construction by the court as to its legal meaning and sufficiency; and the trial court, erroneously, it would seem, but still in the due exercise of its jurisdiction, construed the verdict to mean one for murder in the first degree. But to construe a verdict of doubtful import is a very different thing from assuming the existence of a verdict when there is no verdict in existence; just as to construe an indictment supposed to be doubtful, if we may follow up the illustration given in the Eckart case, is a very different thing from proceeding without any indictment whatever. In the one case there would be legitimate, although perhaps erroneous construction; in the other there would be plain excess of jurisdiction.

To argue that because a question may be raised and passed upon in the trial court, and legitimately passed upon by that court in the due exercise of its jurisdiction, therefore the question of jurisdiction could not thereafter be inquired into collaterally, is to argue in a vicious circle, as was pointed out in the case of Thompson *v.* Whitman, 18 Wall., 467. All courts in all cases necessarily pass upon the question of their own jurisdiction, either expressly or by necessary implication. For when they entertain jurisdiction of a cause, they necessarily decide that the jurisdiction exists. If the fact of such decision by them is to be conclusive, then there could be no investigation whatever of such jurisdiction in any collateral proceeding, a deduction which we know to be an absurdity and not warranted by any adjudicated case. The sufficiency of that which exists is one thing; the existence or non-existence of a jurisdictional fact is another and a very different thing. The non-existence of a jurisdictional fact will render a judgment void; an erroneous ruling on the sufficiency of an existing fact can only affect a judgment when it is attacked by way of appeal or writ of error. This would seem to be the proper criterion of distinction in the authorities.

What Mr. Justice Bradley, speaking for the Supreme Court of the United States, in the case of *Ex parte* Neilson, 131 U. S., 176, said, although with reference to a criminal case, would seem to be appropriate here in principle. He said: "It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional rights than an unconstitutional conviction and punishment under a valid law." The right of trial by jury, when not waived, or assumed to have been waived, is a constitutional right; and the verdict of a jury is a jurisdictional fact without which a court may not validly pronounce judgment. As we have intimated, there may be cases in which parties will be precluded or estopped in collateral proceedings from denying that

there was such trial. But when the fact appears affirmatively upon the record that there was no such trial, and at the same time the fact appears that there should have been such trial, and yet the court proceeded in disregard thereof to determine the cause itself in the place of the jury and to enter judgment, we cannot hold that it was in the due exercise of jurisdiction.

We must hold that the judgment rendered in this cause was equally void with the alleged verdict upon which it was founded. But if we are wrong in this, it is satisfactory to know that our own conclusion thereon is subject to review in a higher tribunal. Being of this opinion, however, we must *reverse the order appealed from, with costs, and remand the cause to the court below, with directions to vacate its judgment and set aside the verdict in the cause, and to award a new trial. And it is accordingly so ordered.*

21 WEDNESDAY, *January 5th, A. D.* 1898.

THE DISTRICT OF COLUMBIA, Appellant,
vs.
ELIZABETH M. HUMPHRIES, by Her Next Friend, John W. Humphries. } No. 742, January Term, 1898.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia and was argued by cousel; on consideration whereof it is now here ordered and adjudged by this court that the order of the said supreme court in this cause be, and the same is hereby, reversed with costs, and that this cause be, and the same is hereby, remanded to the said supreme court, with directions to vacate its judgment and set aside the verdict and to award a new trial.

Per MR. JUSTICE MORRIS.

January 5, 1898.

22 FRIDAY, *January 7th, A. D.* 1898.

THE DISTRICT OF COLUMBIA, Appellant,
vs.
ELIZABETH M. HUMPHRIES, by Her Next Friend, JOHN W. Humphries. } No. 742.

On motion of Mr. A. A. Birney, attorney for the appellee in the above-entitled cause, it is ordered by the court that a writ of error to remove said cause to the Supreme Court of the United States be, and the same is hereby, allowed on giving bond in the sum of two hundred dollars.

23 Know all men by these presents that we, John W. Humphries, as principal, and Dickerson N. Hoover, as surety, are held and firmly bound unto the District of Columbia in the full and just sum of two hundred dollars, to be paid to the said The District of Columbia, its certain attorney, executors, administrators,

or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this eleventh day of January, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas lately, at a Court of Appeals of the District of Columbia, in a suit depending in said court between The District of Columbia, appellant, and Elizabeth M. Humphries, by her next friend, John W. Humphries, appellee, a judgment was rendered against the said Elizabeth M. Humphries, by her next friend, John W. Humphries, and the said Elizabeth M. Humphries, by her next friend, John W. Humphries, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said District of Columbia, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said Elizabeth M. Humphries, by her next friend, John W. Humphries, shall prosecute said writ of error to effect and answer all costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHN W. HUMPHRIES. [SEAL.]
D. N. HOOVER. [SEAL.]

Sealed and delivered in the presence of—
CHAS. BUCKINGHAM.

I consent to approval.
S. T. THOMAS,
Att'y, D. C.

Approved by—
R. H. ALVEY,
Ch. Justice.

[Endorsed:] No. 742. The District of Columbia *vs.* Elizabeth M. Humphries, by her next friend, John W. Humphries. Bond on writ of error to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Jan. 18, 1898. Robert Willett, clerk.

24 UNITED STATES OF AMERICA, *ss:*

To the District of Columbia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Elizabeth M. Humphries, by her next friend, John W. Humphries, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be

corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 18th day of January, in the year of our Lord one thousand eight hundred and ninety-eight.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted January 18, 1898.

S. T. THOMAS,
Att'y, D. C.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jan. 18, 1898. Robert Willett, clerk.

25 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals, before you or some of you, between The District of Columbia, appellant, and Elizabeth M. Humphries, by her next friend, John W. Humphries, appellee, a manifest error hath happened, to the great damage of the said appellee, as by her complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 18th day of January, in the year of our Lord one thousand eight hundred and ninety-eight.

Seal Court of Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

26 Court of Appeals of the District of Columbia.

I, Robert Willet, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 25, inclusive, contain a true

copy of the transcript of record and proceedings in said court in the case of The District of Columbia, appellant, *vs.* Elizabeth M Humphries, by her next friend, John W. Humphries, No. 742, January term, 1898, as the same remains upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 25th day of January, A. D. 1898.

Seal Court of Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: Case No. 16,782. District of Columbia Court of Appeals. Term No., 230. Elizabeth M. Humphries, by her next friend, John W. Humphries, plaintiff in error, *vs.* The District of Columbia. Filed January 27, 1898.

Filed Jan. 27, 1899.

In the Supreme Court of the United States

OCTOBER TERM, 1898.

No. 430.

ELIZABETH M. HUMPHRIES, BY NEXT FRIEND, ETC.,
PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA.

BRIEF FOR PLAINTIFF IN ERROR.

ARTHUR A. BIRNEY,
Attorney for Plaintiff in Error.

In the Supreme Court of the United States

OCTOBER TERM, 1898.

No. 230.

ELIZABETH M. HUMPHRIES, BY NEXT FRIEND, ETC.,
PLAINTIFF IN ERROR,

vs.

THE DISTRICT OF COLUMBIA.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

The plaintiff in error sued the District of Columbia for damages for personal injuries caused by the negligence of the corporation. The plea was "not guilty." At the trial before Cole, J., at the October Term, 1896, the cause was submitted to a jury, of whom John T. Wright was foreman. A sealed verdict was authorized, and on the assembling of the court, the next day, such sealed verdict, signed by all twelve of the jurors, was handed the court by a physician, who stated that Mr. Wright was ill and physically unable to appear in court, and that he had received from him such verdict with directions to deliver it to the court. The defendant objected to the reception of the sealed verdict, but the court, upon being informed by the remaining eleven jurors, upon their oath, that they severally signed the verdict, that they saw Mr. Wright sign it, and that the name "John T. Wright" signed thereto is in his own handwriting, accepted the document as the verdict of the jury, and ordered it spread upon the minutes. Counsel for the defendant asked that the jury be polled and the eleven present severally acknowledged the verdict as theirs.

The defendant then moved the court in arrest of judgment, one of the grounds being—

> "2. Because there was no verdict rendered by the jury in the said cause upon which judgment may be rendered."

Defendant also moved for a new trial, one ground being—

> "7. And because of the irregularity and insufficiency of said verdict."

Both of these motions were overruled by the trial judge, and judgment was entered on the verdict as recorded.

Defendant appealed to the Court of Appeals, but failed to file a transcript of record within the time fixed by the rules of that court, and the appeal was dismissed May 10, 1897. 11 App. Cas. D. C. 68.

Defendant then, *and at the second term after the term at which judgment was entered*, moved the trial court to vacate the judgment on the ground that the verdict was a nullity and the judgment void. The trial judge held that he was without power to deprive plaintiff of her judgment, and denied the motion. Defendant again appealed to the Court of Appeals, which held the verdict a nullity, the judgment void, and remanded the cause with directions to vacate the judgment, set aside the verdict, and grant a new trial.

From this judgment plaintiff took a writ of error to this court.

ASSIGNMENT OF ERRORS.

The Court of Appeals erred in the following particulars:

1. In holding that the written verdict signed by all the jurors was not a lawful verdict.

2. In holding that the judgment entered upon such verdict was void.

3. In directing that such judgment be vacated and set aside.

ARGUMENT.

1. The contention of plaintiff is that after the term at which the judgment was entered (October Term, 1896), neither the trial court, or the Court of Appeals, had jurisdiction to entertain a motion to vacate the judgment. If this be true, then the form of order is immaterial. Precisely this question was determined by this court in—

Phillips *vs.* Negley, 117 U. S. 665.

2. The term having ended at which the judgment was entered, the court was without *power* to entertain the motion to vacate, made at the second term thereafter.

Bronson *vs.* Shulten, 104 U. S. 410.
Phillips *vs.* Negley, 117 U. S. 665.
Hume *vs.* Bowie, 148 U. S. 255.

But the claim of the corporation is that *the judgment was void*, and therefore subject to be vacated *at any time*. Upon this ground alone the Court of Appeals justified its decision.

There are two answers to this contention:

First. The trial court in receiving the sealed verdict as the verdict of the jury was right. Its action in that particular was not even erroneous.

Second. If the trial judge was wrong in thus receiving the writing as the verdict, yet this was *error only*, to be reviewed, if at all, on appeal. It did not render the judgment *void*.

THE VERDICT GOOD.

The Court of Appeals considered the written (sealed) verdict as nothing more than a memorandum, of no legal vitality whatever, and held that there was *no* verdict because the twelve men did not *orally* declare their finding. The right to poll, and have a separate declaration by each juror, is de-

clared a fundamental right, of which the litigant may not be deprived without his *express* consent.

This view is wholly unsound. Polling the jury is a mere local practice. It is unknown in the New England States.

School District *vs.* Bragdon, 3 Foster, 507.
Com. *vs.* Roby, 12 Pick. at 514.

It is most frequently declared to rest within the sound discretion of the trial judge; certainly in civil causes.

Smith et al. *vs.* Mitchell, 6 Georgia, 458.
Bell *vs.* Hutchings, 86 Georgia, 562.
Byrne *vs.* Grossman, 65 Pennsylvania State, 310.
Whitney *vs.* Hamlin, 12 Florida, 18.
Blum *vs.* Pate, 20 California, 69.
Landes *vs.* Dayton, Wright (Ohio), 659.

And the better opinion seems to be that it is not proper to permit a poll, when, with the previous consent of the court, the jury have dispersed.

City Bank *vs.* Kent, 57 Georgia, 283.
Hancock *vs.* Winans, 20 Texas, 320.
School District *vs.* Bragdon, 3 Foster, 507.
State *vs.* Engle, 13 Ohio, 490.
Sutliff *vs.* Gilbert, 8 Ohio, 405, 408.
Pierce *vs.* Hasbrouck, 49 Ill. 23.

And the idea that the written verdict is only a memorandum (which has its foundation only in a dictum of Judge Gibson, 10 S. & R. 84), is utterly opposed to the judgment of this court in *Koon* vs. *Insurance Co., 104 U. S. 106*, where a sealed verdict having, against objection, been read, amended in form, and recorded, all in the *absence of the jury*, it was held to be a good verdict, and the judgment upon it a good judgment. If the writing was a *memorandum only*, there never was a verdict in the case.

The only difference between Koon *vs.* Insurance Co., and the case at bar is that the bill of exceptions in that case recites an agreement of parties to a sealed verdict, while here there was no *express* agreement. But it was tacitly agreed, and assent will be presumed from the absence of objection.

Parmlee et al. *vs.* Sloan, 37 Indiana, 469–480.
Douglass *vs.* Tonsey, 2 Wend, 352.
High *vs.* Johnson, 28 Wis. 72.

It is submitted that the decision in Koon *vs.* Insurance Co. is logically conclusive of this question; but a brief review of some of the State decisions may be of interest.

In Murray *vs.* O'Neal, 1 Call, (Va.) 216, (1798), after the jury had retired it was agreed by the counsel that they should deliver a privy verdict to one Peyton, the deputy clerk of the court. The jury delivered a verdict at the office of the deputy clerk, who was not then present, where another clerk sealed up the verdict with other papers in the case, and put them upon a table; the deputy sheriff then discharged the jury. Peyton, on coming in, sent for the jury, but eleven only appeared, and they were again discharged. The county court gave judgment on the verdict, the district court reversed it "because it did not appear that all the jury were present at the delivery of the verdict;" but the county court was sustained by the Court of Appeals, and its judgment affirmed. The view of the court must have been that *the writing signed by all the jurors was the verdict, and not a mere memorandum.*

The best considered case, and one raising squarely the question whether the signed writing or the subsequent oral delivery is the verdict, is from Texas. Hancock *vs.* Winans, 20 Texas, 320. It was agreed that the jury might return their verdict, sealed, to the clerk. They did so and dispersed. On the assembling of the court, all the jury being present, defendant requested that they be polled, and severally asked if they then, *at the time of its publication*, agreed

to the verdict. Upon objection by plaintiff the court refused to allow such inquiry, but polled them as to whether or not they agreed to the verdict *at the time it was sealed and handed to the clerk.* (323.) On full consideration the Supreme Court sustained the trial judge, and in a carefully prepared opinion showed the danger which would result from a different rule, saying—

> " . . . to permit them to be afterwards polled, to answer whether they are still agreed, after having heard the opinions of others and been subjected to improper influences, would be to render the sealed verdict as unsafe and insecure as the ancient privy verdict," etc.

New Hampshire.

The objection was, that after the jury had been permitted by the court to seal up their verdict and separate the evening before, "the court refused a poll of the jury at the time of returning the verdict and before the same was recorded." The judgment was affirmed, the court holding that the practice of polling had never obtained in New England and that the parties had no right to demand it. Of the sealed verdict they said:

> "This practice operates well for the convenience and comfort both of the court and the jury, and is prejudicial to the rights of no one. But were we, after such an agreement and separation, and the consequent exposure of the members of the jury to be talked and tampered with by witnesses, parties and their friends, to allow a poll, it would not infrequently happen, we apprehend, that some one of the jury might be induced to change his views, and upon a poll disavow his agreement to the verdict; and thus might the whole labor of the trial be lost."
>
> School District *vs.* Bragdon, 3 Foster, 507.

So the same court held that a change of opinion by a juror after he had agreed to a verdict, and the verdict had

been sealed up, and the jury had separated, furnished no cause for refusing the verdict.

Nichols *vs.* Suncock Mfg. Co., 4 Foster, 437.

The case of Williams *vs.* State, 60 Mayland, 402, is not in confiict with these decisions. That was a criminal cause. The indictment was for murder, which crime in that State is divided into two degrees; the foreman orally declared the finding to be guilty in the first degree, but on being polled each juror said only, "guilty," and the trial court having sentenced for the first degree, the Court of Appeals reversed the judgment for error, holding the verdict a nullity.

In holding that there was error the Maryland court was perhaps right; it did not hold, however, that the judgment *was void*; and if its assertion that the verdict was null on the ground stated is equivalent to declaring the judgment void, then it is directly opposed to this court in a strikingly similar case.

Ex parte Eckart, 166 U. S. 481.

Second. However Erroneous the Manner of Receiving the Verdict, the Judgment is Not Void.

If the trial judge erred in accepting the written verdict, and ordering it recorded as the verdict of this jury, it was *error* only and did not render his judgment void.

Failing to perfect an appeal the defendant lost its right to complain of the error.

In Cross *vs.* North Carolina, 132 U. S., 132, a criminal cause, in which the jury were polled *before they had found a verdict*, this court, while not approving the practice, affirmed the judgment below, saying "it was a mere error in procedure or practice, that did not affect the substantial rights of the defendant."

The Court of Appeals held that the departure from correct practice was so shocking as to amount to a deprivation of the right of trial by jury. But to warrant the assertion

that a judgment is void for want of compliance with constitutional requirements it is essential that there be—

> "a *plain and substantial* departure from the fundamental principles upon which our government is based, so that it could with truth and propriety be said that if the judgment were suffered to stand, the party aggrieved would be deprived of his life, liberty or property in violation of the provisions of the Federal Constitution."
>
> Wilson *vs.* North Carolina, 169 U. S. at 593.
> Allen *vs.* Georgia, 166 U. S. 140.
> Hovey *vs.* Elliott, 167 U. S. 409.

> "It is not possible to hold that a party has without due process of law been deprived of his property, when, as regards the issue affecting it, he has by the law of the State, a fair trial in a court of justice, according to the modes of procedure applicable to such cases."
>
> Davidson *vs.* New Orleans, 96 U. S. 97.
> Hustado *vs.* Calif, 110 U. S. 516.

So it is laid down that to avoid a judgment, otherwise than on direct proceedings, it must appear either—

1. That the court was without jurisdiction of the person; or,

2. That the court was without jurisdiction of the subject-matter; or,

3. That the judgment was in excess of the power of the court.

> Ex parte Yarborough, 110 U. S. 651.
> Freeman on Judgments, 116, 120.

> "The general rule is that when a court has jurisdiction by law of the offense charged and of the party who is so charged, its judgments are not nullities. There are exceptions to this rule, but when

> they are relied on as foundations for relief in another proceeding, they should be clearly found to exist."
>
> Ex parte Bigelow, 113 U. S. 331.

As in the last case cited, the question which arose in the case at bar was one which the court "was competent to decide, which it was bound to decide, and its decision was the exercise of jurisdiction."

> Ex parte Parks, 93 U. S. 18.
> Ex parte Yarborough, 110 U. S. 651.

In a later case, where the claim was that the constitutional right of trial by an impartial jury was denied by acceptance of incompetent jurors this was held to be an allegation of error only.

> Re Schneider, 148 U. S. 162.

In the still later case of Eckart, where the petitioner was convicted of murder, the jury failed to specify the degree of the crime as required by law. The court accepted the verdict and sentenced the prisoner as for the highest degree of the crime. It was held both by the Supreme Court of Wisconsin and by this court, that—

> "while the conviction under the sentence was erroneous, the error in passing sentence was not a jurisdictional defect, and the judgment was therefore not void. . . . It was within the jurisdiction of the trial judge *to pass upon the sufficiency of the verdict* and to construe its legal meaning, and, if in so doing he erred . . . it was an error committed in the exercise of jurisdiction."
>
> Re Eckart, 166 U. S. 481.
> Re Belt, 159 Ib. 95.

An examination of the cases cited by the learned Court of Appeals will show that none of them is a fair precedent for the action in this case. They declare the refusal to allow

a poll, etc., to be error, but do not decide that it may be more than that.

Since the judgment was not *void*, however *erroneous*, the trial court was right in afterward declaring want of jurisdiction, after the passing of the term, to vacate the judgment.

Phillips *vs.* Negley, 117 U. S. 665.

The argument found in the opinion of the Court of Appeals that the error (as declared) of the trial judge, was an error of *fact*, it is submitted, is wholly baseless. To hold the action of the trial judge in ordering the written verdict to be recorded as the finding of the jury, to have been a mistake *of fact*, is to ignore all distinctions between fact and law.

It is submitted that the judgment of the Court of Appeals should be reversed, and the order of the trial judge affirmed.

ARTHUR A. BIRNEY,
Attorney for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

No. 230.

ELIZABETH M. HUMPHRIES, by next friend, Plaintiff in Error,

vs.

DISTRICT OF COLUMBIA.

BRIEF FOR DEFENDANT IN ERROR.

This is an appeal from a judgment of the Court of Appeals of the District of Columbia, granting a motion to vacate the judgment of the Supreme Court of the District of Columbia, and granting a new trial, entered in this case January 4, 1897.

The case was tried to a jury on November 20, 1896, and as the trial closed about the hour of adjournment of the court, the jury were told that they might return a sealed verdict, and the following printed paper was given to the jury (Rec. 5):

"When the jury agree upon a verdict, write it out, all the jury sign it, date it, seal it up, and deliver it to the foreman, to be delivered in open court on the first day of December, 1896, *and in the presence of all who signed it.*"

On December 1, 1896, all the jurors appeared in court except *John T. Wright*, who did not appear, but he

having the sealed verdict in his possession, sent it to the court by *Dr. Williams*, who delivered the same, with a statement that the said Wright was ill and confined to his bed and physically unable to appear in court; that he was Wright's attending physician, and as such received the sealed verdict from him with directions to deliver it to the court; whereupon the defendant, by its counsel, objected to the reception, opening and reading of said sealed verdict. (Rec. 4.) The eleven jurors having in response to questions by the court, stated that they had severally signed said verdict, and had seen Wright sign it. Counsel for the defendant asked that the jury be polled, which being done, only *eleven* responded. The Court then received the verdict, and ordered it to be recorded. The defendant moved in arrest and the court overruled its motion, and entered judgment on said verdict, and the defendant removed the case by writ of error to the Court of Appeals. Subsequently the plaintiff moved the trial court to correct the entry of the verdict by setting out at length the written verdict, which the court allowed. (Rec. 7.) Upon the verdict as corrected under the order of the court no new judgment was entered; but the judgment as originally entered, upon the first entry of the verdict as of the *eleven* jurors, was allowed to stand. The only change in the original entry of what purported to be the verdict was in placing upon record the paper signed by the twelve jurors, in place of the entry of the oral verdict of the eleven jurors as delivered in court, in which oral verdict it was declared "that the *remaining jurors* on their oaths say, they find said issue in favor of the plaintiff," etc. (Rec. 4.) The appeal of the District of Columbia was dismissed for failure to comply with the rule in regard to filing transcripts (11 App. D. C. 68):

Thereupon the defendant filed its motion in the trial court, to vacate the judgment because there was no verdict, and that the judgment was not entered in accordance with the practice of the court. (Rec. 9.) This motion was overruled by the court; the defendant again appealed to the Court of Appeals, which court vacated the judgment, set aside the verdict, and awarded a new trial (12 App. D. C. 122); and from this order the plaintiff appealed to this court.

POINTS AND AUTHORITIES.

IT WAS THE RIGHT OF THE DEFENDANT TO POLL THE JURY.

It is the established practice in the courts of this District, as it is in the courts of the State of Maryland, and the courts of many other States of the Union, and also of England, says Mr. Chief Justice Alvey, in 11 Apps. D. C. 73, "that either party has the right to have the jury polled, on the rendition of the verdict by the foreman, at any time before it is finally recorded; and this, although the verdict has been a sealed one, and the jury have separated before bringing it in; unless the right to poll has been *expressly waived*. *Bunn v. Hoyt*, 3 Johns. 255; *Root v. Sherwood*, 6 Johns. 68; *Fox v. Smith*, 3 Cow. 23; *Jackson v. Hawks*, 2 Wend. 619; *Labar v. Koplin*, 4 N. Y. 547; *Blackley v. Sheldon*, 7 Johns. 33; *Rigg v. Cook*, 9 Ill. 351; Thompson & Merriam on Juries, Secs. 337, 338. This subject is very fully and ably examined by Judge Folger in the case of *Warner v. The N. Y. Central R. Co.* 52 N. Y. 437, where it was held that the verdict can only be received from the jury in court, in the presence of the parties, if they think proper to be present, and that it is the right of either party to have the jury polled, unless that right be expressly waived, and that such right

is not waived by simply agreeing that the jury may return a sealed verdict.

The right to poll the jury is regarded as an absolute right in either party, and the refusal of the trial court, upon request to have the jury polled, is such an error as will require the appellate court to reverse the ruling. *James v. State*, 55 Miss. 57. In this last case mentioned it was said by the Court: "Parties should have the means to protect themselves against the consequences of undue influence of any sort, which, employed in the privacy of a jury room, may extort unwilling assent to a given result by some of the jury. Less evil is likely to result from upholding the right to have the jury examined by the poll than from denying it. The modern relaxation of the rules as to what irregularities of the jury will vitiate a verdict makes it more important to preserve the only allowable means of ascertaining if the verdict as announced is the unanimous decision of the jury."

"In the case of *State v. Young*, 77 N. C. 498, where the question was raised as to the right of a party to have the jury polled, the court said: "The right of the judge to poll the jury is immemorial, and has never been questioned, so far as we are informed. We can see no good reason why it should be denied to the defendant, and we cannot conceive a case in which any harm would result from the exercise of it under the direction of the court, and experience shows that notwithstanding the response of the foreman for the jury, there are cases in which individual jurors refuse to assent on being polled. How is the defendant to know that this is really the verdict of all, and that no one has been deceived or coerced into an assent to that which his judgment does not now concur in? There is no mode of ascertaining this fact except by the evidence

of the jurors themselves when they come into court. * * * At this time any juror can retract on the ground of conscientious scruples, mistake, fraud, or otherwise, and his dissent would then be effectual. This right is surely one of the best safeguards for the protection of the accused, and as an incident to jury trials would seem to be a constitutional right, and its exercise is the only mode of ascertaining the fact that it is the verdict of the whole jury."

THERE WAS NO VERDICT IN THE CASE ON WHICH TO ENTER JUDGMENT.

The judgment was founded alone on the sealed verdict; on this sealed verdict the Court considered that the plaintiff recover $7,000.00 "in manner and form aforesaid assessed;" that is, by the "eleven" jurors and not otherwise.

But a sealed verdict, *i. e.*, the paper writing, is not evidence nor is it to be filed or preserved.

28 Ency. of Law 411, note 1, citing.
Dormant v. Ruhenback, 10 S. & R. 84.

The entry should have been, "the jurors on their oath say, etc., and assess her damages," etc.

The verdict must be public.

28 Ency. of Law 416 and note.

The jury must be present to render a sealed verdict.

28 Ency. of Law 409-410 and note.
Thompson & Merrian, Juries, par. 333, 334, 338;
Rigg v. Cook, 9 Ill. at 351;
Fox v. Smith, 3 Cow. 23;
Jackson v. Hawks, 2 Wend. 620;
Root v. Sherwood, 6 Johns, 68;
Lawrence v. Stears, 11 Pick, 501;
Edelin v. Thompson, 2 H. & J. 32.

Polling the jury is a right of the parties.

Thompson & M. on Juries, par. 338;
28 Ency. of Law 1. 349;
2 Poe's Practice, par. 329, 331;
12 Md. 514; 60 Md. 402.

The right is not waived by a sealed verdict.

28 Ency. Law, 415.
Root v. Sherwood, *supra.*
Stewart v. Pugh, 23 Mich., at 77
U. S. V. Patter, 6 McLean, 168

If it can be said that the defendant consented to anything in respect of the sealed verdict, that consent surely cannot exceed the printed, unambiguous, instructions on the paper given to the jury by the Court. Those instructions required *all* the jurors to be present the next day in court; this preserved, by necessary implication, the defendant's right to poll the jury. How can it be considered to have waived any such valuable right? The trial judge did not so consider, nor did the counsel for the appellee, for the court without objection from counsel allowed the defendant to poll the jury, as was its right; or if he considered it was discretionary, he then exercised that discretion.

There is no escape from the fact that there is no entry of any verdict on which any judgment could be founded; or if there is any verdict entered it is of *eleven* jurors only. In contemplation of law, there is no verdict; and there is no judgment.

THE JUDGMENT COMPLAINED OF WAS IRREGULAR AND VOID.

Relief against an irregular or voidable judgment under ancient practice was by writ of *coram nobis.* In modern practice a motion is substituted for this writ.

12 Am. and Eng. Enc., 132; Phillips v. Negley, 117 U. S., 665.
Pickett's Heirs v. Legerwood, 7 Pet., 144; Poe's Practice, 395.

The Court of Appeals, in its opinion dismissing the first appeal of the District in this case pronounced the verdict on which the judgment was based; "a mere nullity and of no effect whatever * * *; a void verdict."

11 Apps. D. C. 77.

THE TRIAL COURT EXCEEDED ITS JURISDICTION IN ENTERING OUT JUDGMENT, AND THE JUDGMENT IS VOID.

In the case of U. S. v. Walker (109 U. S., 258), which was an action on an administrator's bond, it was held that an order passed by the Supreme Court of the District of Columbia directing an administratrix to pay over the fund to her successor was void, because that court exceeded its jurisdiction.

"Although the court" (says Mr. Justice Woods) "may have jurisdiction over the parties and the subject matter, yet if it makes a decree which is not within the powers granted to it by the law of its organization, its decree is *void*."

This court has also said:

"Doubtless a decree of a court having jurisdiction to make the decree cannot be collaterally impeached, but under the act of Congress the District Court had no power to order a sale which should confer on the purchaser rights outlasting the life of French Forrest."

Bigelow v. Forrest, 9 Wall., 339.

"It is no answer to this to say that the court had jurisdiction of the person of the prisoner and of the offence under the statute. It by no means follows that these

two facts make valid, however erroneous it may be, any judgment the court may render in such case."

Ex parte Lange, 18 Wall., 163-176.

A judgment may be impeached, even collaterally, if "the court had no jurisdiction of the case, *or the judgment rendered was beyond its power.*"

Cooper v. Reynolds, 10 Wall., 316.

This court has held that where a court is without authority to pass a particular sentence, such sentence is void.

"It is firmly established that if the court which renders a judgment has not jurisdiction to render it, either because the proceedings, or the law under which they are taken, are unconstitutional, or by any other reason, the judgment is void, and may be questioned collaterally * * * (183). It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's Constitutional rights than an unconstitutional conviction and punishment under a valid law. In the first case, it is true, the court has no authority to take cognizance of the case; but in the other, it has no authority to render judgment against the defendant (184). In *ex parte* Lange and *ex parte* Snow there was denial or invasion of a Constitutional right."

Ex parte Neilsem, 131 U. S., 176.

THE CONSTITUTIONAL RIGHT OF TRIAL BY JURY WAS DENIED THE DEFENDANT IN THIS CASE.

The Seventh Amendment to the Constitution provides that "in suits at common law where the value in controversy shall exceed $20, the right of trial by jury shall be preserved."

In the Territories and the District of Columbia this

involves unanimity in the verdict rendered by the whole number of jurors. By any other verdict a Constitutional right is denied.

Am. Pub. Co. v. Fisher, 166 U. S., 464.
Springfield v. Thomas, *idem*, 707.

THE JUDGMENT OF THE TRIAL COURT WAS NOT ACCORDING TO THE PRACTICE OF THE COURT, AND MIGHT BE SET ASIDE AT ANY TIME.

A judgment may be set aside by a court after the term, where it was not entered in accordance with the practice of the court:

Bailey v. Sloan, 65 Cal., 387.
Ames v. Brinsden, 25 Kan., 520.
Fenton v. Garlick, 6 Johns N. Y., 288.
Dick v. McLaurin, 63 N. C., 185.
Merrick v. Baltimore, 43 Md., 299.
Folger v. Columbiana Ins., 99 Mass., 267.
Fithian v. Monks, 43 Mo., 502
Seamster v. Blockstock, 83 Va., 232.
Anthony v. Kasey, 83 Va., 338.

"A departure from an established mode of procedure will often render the judgment void; thus, a sentence of a person charged with felony upon conviction by the court without the intervention of a jury, would be invalid for any purpose. The decree of a court of equity upon oral allegations without written pleadings would be an idle act of no force beyond that of an advisory proceeding of the chancellor, and the reason is that the courts are not authorized to exercise their power in that way."

Windsor v. McVeigh, 93 U. S., 283.

"Whatever difficulty may be experienced in giving to those terms (due process of law) a definition which will embrace every permissible exercise of power affecting private rights and exclude such as is forbidden, there

can be no doubt of their meaning when applied to judicial proceedings. They then mean a course of legal proceedings, according to those rules and principles which have been established in our system of jurisprudence, for the protection and enforcement of private rights."

Pennoyer v. Neff, 95 U. S., 733.

"Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court; but if it acts without authority, its judgment and orders are regarded as nullities. They are not voidable, but simply void."

Elliott v. Peirsol, 1 Pet., 340.
Wilcox v. Jackson, 13 Pet., 511.
Hickey v. Stewart, 3 How., 762.
Thompson v. Whitman, 18 Wall., 467.
In re Sawyer, 124 U. S., 220.

The difference between void and voidable judgments is that the former can always be assailed in any proceeding, and the latter in a direct proceeding only.

28 Am. & Eng. Ency. of Law, 473, 475.
Alexander v. Nelson, 42 Ala., 462.

An irregular judgment may be set aside at a subsequent term.

Union Bank v. Crittenden, 2 Cranch C. C., 283.
Ault v. Elliott, *idem*, 372.
Jones v. Kemper, *idem*, 535.
Hyer v. Hyatt, *idem*, 633.
Newton v. Weaver, *idem*, 685.

THE REASONS ASSIGNED BY THE TRIAL COURT IN ITS OPINION ARE INAPPLICABLE.

The learned justice of that court, in overruling the motion to vacate the judgment (Rec. 11), based his action upon the idea that although the defendant was denied its constitutional right of trial by jury, nevertheless the court in entering the judgment merely committed *an error of law*, reversible only by appeal.

The principal case relied on by counsel for the appellant is *in re* Eckert, 166 U. S., 481, which is entirely dissimilar to the case at bar. In that case the verdict did not acquit Eckert of the crime of which he was charged, but found that he had committed an offence embraced within the accusation upon which he was tried, and the verdict had been held good by the Supreme Court of Wisconsin; so that this court in that case was dealing not with a verdict that had been adjudicated to be a mere nullity, but with a verdict which had been adjudged by the highest court of the State to be a good verdict.

So also in respect of the case *in re* Belt, 159 U. S., 95. Belt had been convicted in 1893 in the Police Court of the District of Columbia of the crime of larceny. In that court the record showed that he waived trial by jury and was tried by the court without a jury. In 1894 he was indicted in the Supreme Court of the District of Columbia for a second offence of larceny, and it was sought to be shown at the trial that this was the second offence by producing the record of the Police Court in the first case against him, to which objection was made on the ground that the record of the Police Court showed that he had waived trial by jury, and that the conviction in the Police Court was, therefore, unconstitutional and void. But the court in refusing his

application for *habeas corpus* dealt not with a *void verdict or void judgment*, but with a judgment of the Police Court, admitted in evidence by the Criminal Court, whose action had been affirmed by the Supreme Court of the District of Columbia.

For these reasons it is submitted that the judgment of the court below should be affirmed.

S. T. THOMAS,
A. B. DUVALL,
For District of Columbia, Appellant.

HUMPHRIES *v.* DISTRICT OF COLUMBIA.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 230. Argued April 4, 1899. — Decided May 1, 1899.

In this case a jury was empanelled, trial had, and the case submitted on the 30th of November, 1896, with the following written instructions: "When the jury agree upon a verdict, write it out, all of the jurors sign it, date it, seal it up and deliver to the foreman, to be delivered in open court on the 1st day of December, 1896, and in the presence of all who sign it." On the 1st of December the jury returned the following verdict in writing signed by all. The official record of the proceedings is as follows: "Come here again the parties aforesaid in manner aforesaid, and the same jury return into court, except John T. Wright, who does not appear, and having said sealed verdict in his possession as foreman sends the same to the court by Dr. McWilliams, who delivers the same to the court with the statement that the said John T. Wright is ill and

Statement of the Case.

confined to his bed and physically unable to appear in court; that he, said McWilliams, is his attending physician, and as such received from said Wright said sealed verdict with direction to deliver it to the court; whereupon the defendant, by its counsel, objected to the reception, opening and reading of said sealed verdict; whereupon, in answer to the questions of the court, the remaining jurors severally on their oath say that they severally signed said verdict, and that they saw said John T. Wright sign the same, and that the name "John T. Wright," signed thereto, is in his handwriting; "thereupon the remaining jurors on their oath say they find said issue in favor of the plaintiff and assess her damages by reason of the premises at seven thousand dollars ($7000)." The counsel for the defendant ask that the jury be polled, which is done, and each of said remaining jurors on his oath says that he finds said issue in favor of the plaintiff and assesses her damages by reason of the premises at $7000.00. Judgment was entered on this verdict against the District. It was contended by the District, which contention was sustained by the Court of Appeals, that this judgment was a nullity. *Held*, That the defect complained of was merely a matter of error, which did not render the verdict a nullity.

THIS case is before the court on error to the Court of Appeals of the District of Columbia. The facts are these: On May 22, 1896, the plaintiff in error filed an amended declaration in the Supreme Court of the District, claiming damages from the defendant, now defendant in error, on account of injuries caused by a defective condition of the bridge between Washington and Anacostia — a condition resulting from the negligence of the defendant. A jury was empanelled, trial had, and the case submitted to it on November 30, with instructions to return a sealed verdict. The instructions and the verdict were returned on the morning of December 1, and were in the following form:

"When the jury agree upon a verdict, write it out, all of the jurors sign it, date it, seal it up and deliver to the foreman, to be delivered in open court on the 1st day of December, 1896, and in the presence of all who sign it.

Elizabeth M. Humphries
v.
The District of Columbia. } No. 38281. At Law.

Dated *November* 30, 1896.

"We, the jurors sworn to try the issue joined in the above-

entitled cause, find said issue in favor of the plaintiff, and that the money payable to him by the defendant is the sum of seven thousand dollars and — cents ($7000.00).

All sign:

Michael Keegan.	Lester G. Thompson.
W. H. St. John.	Wm. J. Tubman.
Geo. W. Rearden.	John T. Wright.
James D. Avery.	Jos. I. Farrell.
Bernard F. Locraft.	Isaac N. Rollins.
Geo. W. Amiss.	Thos. J. Giles."

The proceedings on December 1 are thus stated in the record:

"Come here again the parties aforesaid in manner aforesaid, and the same jury return into court, except John T. Wright, who does not appear, and having said sealed verdict in his possession as foreman sends the same to the court by Dr. McWilliams, who delivers the same to the court with the statement that the said John T. Wright is ill and confined to his bed and physically unable to appear in court; that he, said McWilliams, is his attending physician, and as such received from said Wright said sealed verdict with direction to deliver it to the court; whereupon the defendant, by its counsel, objected to the reception, opening and reading of said sealed verdict; whereupon, in answer to the questions of the court, the remaining jurors severally on their oath say that they severally signed said verdict, and that they saw said John T. Wright sign the same, and that the name 'John T. Wright,' signed thereto, is in his handwriting; 'thereupon the remaining jurors on their oath say they find said issue in favor of the plaintiff and assess her damages by reason of the premises at seven thousand dollars ($7000).'

"The counsel for the defendant ask that the jury be polled, which is done, and each of said remaining jurors on his oath says that he finds said issue in favor of the plaintiff and assesses her damages by reason of the premises at $7000."

Upon this verdict a judgment was entered. Proceedings in error were taken, but were dismissed by the Court of

Appeals on account of a failure to have the bill of exceptions prepared in time. Thereafter, and at a succeeding term, the defendant filed a motion to vacate the judgment on the ground that there was no valid verdict, which motion was overruled. On appeal to the Court of Appeals this decision was reversed and the case remanded, with instructions to vacate the judgment, to set aside the verdict and award a new trial. 12 App. D. C. 122. This ruling was based on the proposition that the verdict was an absolute nullity, and therefore the judgment resting upon it void, and one which could be set aside at any subsequent term.

Mr. Arthur A. Birney for plaintiff in error.

Mr. S. T. Thomas and *Mr. A. B. Duvall* for defendant in error.

Mr. Justice Brewer, after stating the case, delivered the opinion of the court.

The single question presented by the record, the right to review which is sustained by *Phillips* v. *Negley*, 117 U. S. 665, is whether the verdict, returned under the circumstances described, was an absolute nullity, or, at least, so far defective that no valid judgment could be entered upon it. Such is the contention of the defendant. On the contrary, the plaintiff insists that whatever irregularities may have occurred, or be apparent in the proceedings, they are simply matters of error, to be corrected on direct proceedings within the ordinary time, and in the customary manner for correcting errors occurring on a trial. Is the defect or irregularity disclosed a mere matter of error or one which affects the jurisdiction? The opinion of the Court of Appeals, announced by Mr. Justice Morris, is an exhaustive and able discussion of the question, arriving at the conclusion that the verdict was an absolute nullity, and therefore the judgment, based upon it, one that could be set aside, not merely at the term at which it was rendered, but at any subsequent term.

While appreciating fully the strength of the argument made by the learned judge, we are unable to concur in the conclusions reached. That the verdict returned expressed at the time it was signed the deliberate judgment of the twelve jurors, cannot be questioned. That it remained the judgment of the eleven at the time it was opened and read is shown by the poll that was taken, and that it was still the judgment of the absent juror at the time he forwarded it to the court is evident from the testimony. So the objection runs to the fact that at the time the verdict was opened and read each of the twelve jurors was not polled, and each did not then and there assent to the verdict as declared. That generally the right to poll a jury exists may be conceded. Its object is to ascertain for a certainty that each of the jurors approves of the verdict as returned; that no one has been coerced or induced to sign a verdict to which he does not fully assent. It is not a matter which is vital, is frequently not required by litigants; and while it is an undoubted right of either, it is not that which must be found in the proceedings in order to make a valid verdict. Take the case suggested on argument. Supposing the twelve jurors are present, and the defeated party insists upon a poll of the jury and that right is denied, can it be that a verdict returned in the presence of the twelve by the foreman, without dissent, is by reason of such denial an absolute nullity? Is not the denial mere error, and not that which goes to the question of jurisdiction? There are many rights belonging to litigants — rights which a court may not properly deny, and yet which if denied do not oust the jurisdiction or render the proceedings absolutely null and void.

The line of demarcation between those rulings which are simply erroneous and those which vitiate the result may not always be perfectly clear, and yet that such demarcation exists is conceded. This ruling of the trial court, conceding it to be error, is on the hither side of this line, and could only be taken advantage of by proceedings in error. It is not so vital as to make the verdict a nullity or the judgment entered thereon void. Suppose, after the jury, at the end of a protracted trial, have agreed upon the verdict and come into

court to announce it, and after it has been read in open court but before a poll can be had one of the jurors is suddenly stricken dead, can it be that the whole proceeding theretofore had become thereby a nullity? Can it be that after each of the jurors has signed the verdict and after it has been returned and each is present ready to respond to a poll, the mere inability to complete the poll and make a personal appeal to each renders the entire proceedings of the trial void? We are unable to assent to such a conclusion. The right to poll a jury is certainly no more sacred than the right to have a jury, and under many statutes a trial of a case, in which a jury is a matter of right, without a waiver thereof, has again and again been held to be erroneous and subject to correction by proceedings in error. But it is also held that an omission from the record of any such waiver is not fatal to the judgment.

"The fourth alleged error is to the effect that the judgment in the Kansas court was void because the cause was tried by the court without the waiver of a trial by jury entered upon the journal. Whatever might be the effect of this omission in a proceeding to obtain a reversal or vacation of the judgment, it is very certain that it does not render the judgment void. At most it is only error, and cannot be taken advantage of collaterally." *Maxwell* v. *Stewart*, 21 Wall. 71. "A trial by the court, without the waiver of a jury, is at most only error." *Same case*, 22 Wall. 77.

If a trial without a jury, when a jury is a matter of right and no waiver appears of record, is not fatal to the judgment, *a fortiori* the minor matter of failing to poll the jury when it is clear that the verdict has received the assent of all the jurors, cannot be adjudged a nullity, but must be regarded as simply an error, to be corrected solely by direct proceedings in review. See in reference to the distinction between matters of error and those which go to the jurisdiction, the following cases: *Ex parte Bigelow*, 113 U. S. 328; *In re Coy*, 127 U. S. 731; *In re Belt*, 159 U. S. 95; *In re Eckart*, 166 U. S. 481.

We are of opinion that the defect complained of was merely

a matter of error, and does not render the verdict a nullity.

The judgment of the Court of Appeals will therefore be reversed and the case remanded with instructions to affirm the judgment of the Supreme Court of the District of Columbia.